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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 26

HONORABLE PHILIP L. SULLIVAN, CHIEF JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS,
Petitioner,

vs.

OTTO BEHIMER AND JOHN A. ROBERTS,
Respondents.

REPLY BRIEF FOR PETITIONER

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This reply is addressed to two aspects of the brief for respondent. The first concerns respondents' arguments which are addressed to the question presented and accepted for review by this Court. It is hoped that a brief comment upon these arguments will be helpful to the Court. The second concerns respondents' attempt to raise contentions which are extraneous to the review authorized by this Court, which were not considered by the Court of Appeals below, and which Petitioner feels are demonstrably frivolous.

I.

As To The Question Presented

A. Respondents advance the rule that statutes should be so construed as to give effect to every clause and sentence. But this cannot advance respondents' argument, failing as it does to show wherein Petitioner's construction of § 1404(a) violates this rule in any respect.

In short, Petitioner agreed that the concluding clause "where it might have been brought" acts as a limitation upon the power of District Courts to transfer civil actions under § 1404(a) (Pet. Br. p. 8). Petitioner's construction gives full effect to this limitation by forbidding transfer of civil actions to forums which, irrespective of the consent of the parties, do not possess jurisdiction to hear and determine (Pet. Br. pp. 14-17).

B. Respondents argue that, grammatically, § 1404(a)'s concluding clause refers to "a point in time in the past—a point of time prior to the transfer, not simultaneous with it" (Resp. Br. p. 6).

Petitioner does not disagree. However, the point in time at which the action "might have been brought" in the transferee forum is not grammatically required or implied to be prior to the time the action was initially commenced, as respondents argue. Grammatically speaking, the point in time at which the transfer power is determined may properly be any time prior to the exercise of such power (e.g., when the motion to transfer is presented). Such an interpretation is not only consistent with the grammatical reading of the statute (Pet. Br. pp. 11-13) but also comports with the sense of the statute in that it measures the existence of the transfer power and the need for its exercise in the light of contemporaneous factors, rather than those existing prior to the suit.

Were the statute to be read as respondents urge—that is, that the availability of a transferee forum should be determined on the basis of pre-suit conditions—subsequent changes in the residences of the parties would presumably be immaterial. A diversity plaintiff who changed residence during the course of the lawsuit, for example, would be unable to request the transfer of his action to his new residence, since venue there was originally improper. Likewise, if respondents' argument be correct, the transfer of an action to a forum originally but not contemporaneously possessed of subject matter jurisdiction would presumably be authorized, despite the withdrawal of such jurisdiction as illustrated by the Congressional amendment to 28 U.S.C. § 1332, Public Law 85-554.[1]

C. Petitioner disputes respondents' assertion that § 1404(a) was enacted simply "to remedy a situation presented in *Baltimore & Ohio R. Co.* v. *Kepner*, 314 U.S. 44 (1941)" (Resp. Br. p. 6). The House Reports cited by respondents (which reports simply reproduce the Reviser's Notes) set forth the Kepner case as "*an example* of the need of such a provision . . ." (emphasis supplied). This interest in *Kepner*, however, was due only to its restriction upon the full play of *forum non conveniens*. *Ex parte Collett*, 337 U.S. 55, 69, 71 (1949). The fact that more than one forum happened to be open to plaintiff in the *Kepner* case was not mentioned either in the House Reports or the Reviser's Notes, and consequently that fact cannot be relied upon as indicating a limitation on the statutory transfer power.

The Reviser's Notes do say that § 1404(a) "was drafted in accordance with the doctrine of *forum non conveniens*

[1] For the purposes of diversity jurisdiction and removal, a corporation is now "deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business."

. . ." Respondents do not, however, attempt to answer Petitioner's showing that under *forum non conveniens* the instant action could have been routed to the appropriate Utah forum by the device of a conditional dismissal (Pet. Br. pp. 17-22). It would indeed be anomalous if § 1404(a), with its *forum non conveniens* antecedent, were to be construed to prohibit that which its common law predecessor authorizes: viz., the re-location of actions in the interest of justice.[2]

D. Respondents assert that in almost all reported *forum non conveniens* cases there was more than one forum open to the plaintiff, and for this respondents cite the decisions in *Josephson, Anthony, Torres,* and *Paramount Pictures*[3] (Resp. Br. p. 8). These decisions, of course, involved § 1404(a) transfers and not *forum non conveniens;* furthermore, an examination of them discloses that the alternate (transferee) forum became available to the plaintiff upon the post-suit waiver and consent of some or all of the defendants. These decisions therefore support Petitioner's construction of § 1404(a) and his transfer of the action below to the District of Utah.

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[2] If respondents' construction of § 1404(a) is correct, a diversity action with post-suit waiver of venue or personal service, filed in a federal district court sitting in New York or New Jersey, for example, could not be transferred. But the Chinese copy of such action, if filed in the State court of the district (where now under some circumstances, in view of the recent amendment to 28 U.S.C. § 1332, the action must be filed) would upon such waiver be transferable (Pet. Br. pp. 19-20). As so construed, § 1404(a) would be strangely retrogressive for a remedial statute.

[3] The full citations of these cases are: *In re Josephson,* 218 F. 2d 174 (1st Cir. 1954); *Anthony* v. *Kaufman,* 193 F. 2d 85 (2d Cir. 1951), cert. denied, 342 U.S. 955 (1952); *Torres* v. *Walsh,* 221 F. 2d 319 (2d Cir. 1955), cert. denied, 350 U.S. 836 (1955); *Paramount Pictures* v. *Rodney,* 186 F. 2d 111 (3rd Cir. 1950), cert. denied, 340 U.S. 953 (1951).

II.

As To The Extraneous Matter Now Urged

The question presented by Petitioner to this Court, and which this Court undertook to review by writ of certiorari, concerns only the question of the power of the federal district courts under § 1404(a). This question was one which at the time of its presentation respondents regarded as adequately stated and to which they offered no alternate or additional questions.[4]

Respondents now contend that this Court should review not only this statutory power but also the factual propriety of Petitioner's transfer in the instant case. Thus, respondents have it that Petitioner's transfer was both premature and an abuse of discretion, and to these contentions they devote a goodly portion of their brief.

These two contentions are frivolous for three reasons: (A) being outside the scope of the review granted herein, the issues are not before this Court; (B) not having been ruled upon by the Court of Appeals below, the issues are in any event unsuited for determination by this Court; and (C) on the merits, respondents are wrong.

A. "It is well settled," Mr. Justice Douglas declared for a unanimous Court, "that this Court confines itself to the ground upon which the writ [of certiorari] was asked or granted, the review here being no broader than that sought by petitioner." *Helis* v. *Ward*, 308 U.S. 365, 370 (1939); *Trailmobile Co.* v. *Whirls*, 331 U.S. 40, 48 (1947). Accordingly, to paraphrase Mr. Justice Jackson's remarks in

[4] Respondents, in their brief opposing certiorari, stated (p. 1) that "the question presented [is] adequately set forth in the petition."

Irvine v. *California*, respondents' smuggled contentions must be disregarded.[5]

B. The Court of Appeals below did not reach and made no ruling upon these additional contentions of respondents (R. 93). If only for this reason, these issues should not be determined by this Court. It is only in exceptional cases that this Court will rule upon issues not reached by the Court of Appeals. *Owens* v. *Union Pacific R. Co.*, 319 U.S. 715, 724-725 (1943). Since respondents have not suggested (and could not suggest) any circumstances rendering this situation exceptional, the issues are not appropriate for resolution.

C. Finally, respondents' contentions about Petitioner's prematurity and abuse of discretion are unfounded on the merits for the reasons stated by Petitioner in his Answer to the Rule to Show Cause (R. 87-90). Petitioner thinks it necessary only to add that respondents' assertion that the considerations of convenience would change were respondents to sue only on their own behalf (Resp. Br. pp. 10-12) is incorrect. The substantive allegations of the complaint as to dominance and control, which have been put in issue by the defendants' answers (R. 15, 53), would still remain to be resolved in the light of the testimony of Utah witnesses.

Wherefore, Petitioner respectfully requests that the judgment of the United States Court of Appeals for the Seventh

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[5] This Court has expressly "disapprove[d] the practice of smuggling additional questions into a case after we grant certiorari." *Irvine* v. *California*, 347 U.S. 128, 129 (1954). See also *Mazer* v. *Stein*, 347 U.S. 201, 208 n. 6 (1954).

Circuit be reversed, and that this cause be remanded for such further proceedings as may be proper.

Respectfully submitted,

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